

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

KANSAS CITY LIVE BLOCK 139 RETAIL, LLC

Respondent

v.

FRAN'S K.C. LTD, ET AL.

Appellants

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DOCKET NUMBER WD78786 and WD78912

DATE: August 9, 2016

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Appeal From:

Circuit Court of Jackson County, MO  
The Honorable Robert Michael Schieber, Judge

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Appellate Judges:

Division One  
Anthony Rex Gabbert, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

KANSAS CITY LIVE BLOCK 139 RETAIL, LLC, Respondent, v.  
FRAN'S K.C. LTD, ET AL., Appellants

WD78786 and WD78912

Jackson County

Before Division One Judges: Anthony Rex Gabbert, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

Fran's K.C. Ltd. (Fran's) entered into a ten-year lease agreement with Kansas City Live Block 139 Retail, LLC (KC Live) for premises in the Kansas City Power & Light District. The lease contained provisions addressing the payment of rent, liquidated damages, late charges for past due rent, and the payment of attorney fees in case of litigation. Mr. Hak Joon Kim and 1482111 Ontario Inc. are guarantors on the lease. In 2011 and 2012 KC Live sent Fran's multiple notices of default, amounting to \$3,596,557.89 owed under the lease. After a 2012 bench trial, KC Live was awarded possession of the premises. To re-let the premises, KC Live had had to provide the subsequent tenant a \$400,000 tenant finish allowance and permission to use the trade fixtures left on the premises. In September 2013, KC Live filed its first amended petition, including causes of action for breach of the lease and breach of the guaranty against Fran's and the guarantors. Fran's answer and counterclaim to KC Live's petition included causes of action for fraud in the inducement, negligent misrepresentation, breach of the lease, and conversion. Following a 2015 bench trial, the trial court entered judgment against Fran's and the guarantors, jointly and severally, in the amount of \$3,596,577.89 and ruled that KC Live was entitled to attorney fees and costs under the terms of the parties' lease. Fran's appeals.

**AFFIRMED IN PART AND REVERSED IN PART.**

**Division One holds:**

In its first point, Fran's argues that the trial court erred in denying its request for a jury trial because the jury trial waivers in the lease and guaranty do not apply to the tort claims asserted in its counterclaims. We disagree.

When determining if a claim is related to a contract there must be some connection between the issue and a reference to or construction of some portion of the agreement. Here, Fran's counterclaims relate directly to an alleged predatory leasing scheme which required review of the terms of the lease. In addition, the circuit court found that Fran's had no right to rely on any alleged pre-contractual misrepresentations by KC Live because the lease stated that no representations were made and that Fran's had conducted an independent investigation regarding all information provided by KC Live.

In its second point, Fran's argues that the trial court erred in awarding liquidated damages to KC live because there was no proof of actual damages and the treble damages award was not a reasonable estimate of potential damages. We agree.

For a liquidated damages clause to be valid, actual harm must occur and the amount awarded must be a reasonable prediction of the harm caused by the breach and must be of a kind difficult to estimate accurately. Here, actual harm occurred because the premises was dark for nine months. Although this actual damage has been shown, the damages requested under the contract for 300% of the contract amount in addition to rent previously awarded is unreasonable because it is disproportionate to the amount of harm anticipated when the contract was made.

In its third point, Fran's argues that the trial court erred in awarding late charges to KC Live because there was no proof of actual damages and the late charges awarded were not a reasonable estimate of potential damages. We agree.

Late charges are a form of liquidated damages and, therefore, must be a reasonable prediction for the harm caused by the breach. Here, the late fee awarded was calculated monthly and resulted in an award more than five times the total interest assessed on the premises. In addition, KC Live failed to show that it suffered from any substantial damages not already compensated by other contractual provisions. Therefore, the award, as granted by the trial court, was not a reasonable estimate of the damages suffered by KC Live and is an unenforceable penalty.

In its fourth point, Fran's asserts that the attorney fee awards should be reversed or reduced based on the decisions of jury waiver, liquidated damages, and late charges. We agree.

If a contract provides for the payment of attorney fees, then the trial court must award them to the prevailing party. Because this Court has upheld the ruling waiving the right to a jury trial, the attorney fee awards as to this matter are well within the trial court's discretion. Because the liquidated damages and late charge awards were found to be unenforceable penalty provisions, the attorney fees should be remanded and reduced because KC Live is no longer the prevailing party in these matters.

In its fifth point on appeal, Fran's argues that the lease permits recovery only where KC Live files suit against Fran's and does not permit recovery of fees incurred to defend counterclaims or monitor third party claims. We disagree.

Typically, the failure to allocate or segregate fees is not fatal to the prevailing party's award. Here, the lease expressly states that Fran's is responsible for reimbursing KC Live for its reasonable attorney fees and cost of litigation. Litigation encompasses the entire process of carrying on a lawsuit, including the defense of counterclaims.

Therefore, we affirm in part and reverse in part.

Opinion by: Thomas H. Newton, Judge

August 9, 2016

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